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No. 94 - 1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, *et al.*
Petitioners,

vs.

RICHARD G. EVANS, *et al.*
Respondents.

On Writ of Certiorari to
the Supreme Court of the State of Colorado

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE GAY AND LESBIAN LAWYERS OF PHILADELPHIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.4 of the Rules of this Court *amicus* respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondents. Petitioners have consented to the filing of this brief. Respondents offered no response.

The Gay and Lesbian Lawyers of Philadelphia is a bar association organized to promote the civil and human rights of lesbians and gay men. It serves Pennsylvania, Southern New Jersey, and Delaware, with a roster of approximately 300 lawyers. GALLOP is recognized as a minority bar association by the Philadelphia Bar Association.

GALLOP members regularly represent victims of sexual orientation discrimination. New Jersey, the City of Philadelphia, and several other cities in Pennsylvania prohibit discrimination on the basis of sexual orientation in employment and other pursuits. Pennsylvania and Delaware have no statewide protection against

such discrimination.

GALLOP takes particular interest in this Court's interpretation of the federal Constitution inasmuch as it was written in the City of Philadelphia in 1787. Further, the Fourteenth Amendment, which prohibits any state from denying to any person within its jurisdiction the equal protection of the laws, was adopted in 1868, under the leadership of Thaddeus Stevens, United States Representative from Pennsylvania.

Dated: June 19, 1995

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QUESTION PRESENTED

Whether discriminatory legislation enacted directly by popular vote is entitled to the same presumption of constitutionality as a measure enacted through the traditional legislative process?

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BRIEF OF THE GAY AND LESBIAN LAWYERS OF PHILADELPHIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* is set forth in the motion that precedes this brief.

SUMMARY OF ARGUMENT[1]

Petitioners stress that Amendment 2 was approved directly by the people of Colorado in a democratic election, thereby implying

[1] *Amicus* relies on an article written by Professor Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503 (1990), and on the author's permission for its use herein, to develop this brief. Cf. Charlow, Judicial Review, Equal Protection and the Problem with Plebiscites, 79 Cornell L. Rev. 527 (1994) (specifically criticizing Professor Eule's theory).

that Amendment 2 is entitled to at least the same presumption of validity as legislatively-enacted legislation. Brief for Petitioners at 3, 14. *Amicus* argues that the Constitution contemplates representative government and a divided power scheme in order to safeguard minority rights from the tyranny of a majority united by prejudice or the passion of the day. Accordingly, measures taken against minorities by popular vote are not entitled to such a presumption of validity.

Although American government derives its ultimate authority from the will of the people, the United States Constitution nonetheless imposes both substantive and procedural political processes by which it balances majority rule against the preservation of minority rights, even at the state level. When working properly, these mechanisms "filter" otherwise unrestrained majority rule to ensure that legislation does not arbitrarily burden constitutional rights.

Under such circumstances, this Court confers a presumption of constitutionality to such legislation on the belief that if the legislation passed through these "filters," there is no reason to believe that the Constitution has been violated. Whenever this Court suspects that these filters have failed to work properly, however, this Court withholds the presumption of constitutionality, thereby intensifying its role as a filter through which constitutionality is assured.

Direct initiative lawmaking, such as that used in the passage of Amendment 2, wholly bypasses these constitutionally-designed filters. In evaluating Amendment 2, a direct initiative which expressly burdens minority rights, this Court need not "suspect" but may presume that the filters played no part in balancing majority rule against minority rights. Accordingly, there is no reason this Court should accord the usual presumption of constitutionality to Amendment 2; indeed, *amicus* respectfully suggests that this Court should expressly withhold the presumption of constitutionality in this case and subject Amendment 2 to a more

searching judicial scrutiny.

Pursuant to these principles of heightened scrutiny, this Court's decision in Hunter v. Erickson, 393 U.S. 385 (1969), mandates that a state may not allocate political power on the basis of some non-neutral, group-specific principle. In the instant case, rather than merely repealing existing antidiscrimination laws which protected gays and lesbians from invidious discrimination, Amendment 2 went one step further and fundamentally reallocated political power along the type of non-neutral, group-specific principle condemned in Hunter. Accordingly, pursuant to a heightened scrutiny assumption, Amendment 2 wholly fails to comply with the Hunter mandate, and thereby violates the federal equal protection guarantee. On this basis, this Court should strike down Amendment 2.

ARGUMENT

DISCRIMINATORY LEGISLATION ENACTED DIRECTLY BY POPULAR VOTE IS NOT ENTITLED TO THE SAME PRESUMPTION OF CONSTITUTIONALITY AS A MEASURE ENACTED THROUGH THE TRADITIONAL LEGISLATIVE PROCESS.

I. THE UNITED STATES CONSTITUTION MANDATES THAT STATE POLITICAL STRUCTURES BALANCE MINORITY RIGHTS AGAINST THE RULE OF IMPASSIONED MAJORITARIANISM.

American government derives its ultimate legitimacy from the will of the people. The Constitution, however, expresses a clear preference against purely democratic lawmaking both at the state and the federal level. This preference emanated from the Framers' strong concern for the threat posed by "factions," those narrow interests acting contrary to the general public good and contrary to the rights of electoral minorities. The Constitution therefore embraces several substantive and procedural safeguards which filter naked majoritarian preferences directed at these groups. These filters balance the democratic principle of majority rule against the inherent dignity and autonomy of the individual.

A. The United States Constitution Guarantees Certain Substantive Rights Against the Rule of Majoritarian Will.

The Constitution prohibits the political branches of government from making or enforcing law which abrogates certain substantive rights guaranteed to the individual. These prohibitions place certain natural, civil, and political rights beyond the reach of an electoral majority who would curtail minority rights. "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Accord Lucas v. 44th Gen. Assembly of Colo., 377 U.S. 713, 736 (1964) ("[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be").

A few of these rights include: freedom of religion and speech (U.S. Const. amend. I), freedom from unreasonable governmental searches and seizures (U.S. Const. amend. IV), freedom from compelled self-incrimination (U.S. Const. amend. V), and the right to equal protection of the laws (U.S. Const. amend. XIV, §1, cl. 4). Further, all of these substantive guarantees prohibit violations by both the federal government and the state governments. See, e.g., Everson v. Bd. of Education, 330 U.S. 1 (1947) (freedom of religion); Martin v. Struthers, 319 U.S. 141 (1943) (freedom of speech); Malloy v. Hogan, 378 U.S. 1 (1964) (freedom from compelled self-incrimination); and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (constitutional guarantee of equal protection which, by its terms, binds only the states applies with equal force to the federal government).

In sum, the United States Constitution protects minority[2] rights against both federal and state electoral majorities who would curtail those rights. Indeed, as James Madison noted, "the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents." J. Madison, To Thomas Jefferson, in 11 The Papers of James Madison 295, 298 (R. Rutkind & C. Hobson eds. 1977) (letter dated Oct. 17, 1788).

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[2] *Amicus* uses the term "minority" to refer generally to either an individual or an identifiable group of individuals who resist majoritarian will, as expressed by the exercise of legislative power. See The Federalist No. 51, at 351 (J. Madison) ("If a majority be united by a common interest, the rights of the minority will be insecure").

B. The United States Constitution also Guarantees Certain Processes Which, in turn, Protect Against the "Unfiltered" Rule of Majoritarian Will.

Besides prohibiting majoritarian excesses against certain recognized substantive rights, the Constitution also imposes certain procedural safeguards by which it curbs otherwise unfiltered majoritarianism. These processes evidence a preference against purely democratic lawmaking, placing the legislative power in the hands of the people's chosen representatives. In addition, the Constitution fragments and checks the representatives' delegated power in order to prevent the aggregation of (and, thereby, the abuse of) that power.

1. Representative Government

> It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part . . . . If a majority be united by a common interest, the rights of the minority will be insecure.

The Federalist No. 51, *supra*, at 351.[3]

Article IV, Section 4 of the Constitution imposes on the "United States" an obligation to "guarantee to every State in this Union a Republican Form of Government." The Constitution does not

[3] This Court routinely references the Federalist Papers to discern the Framers' intended constitutional design and to comport present day decisions with that design. See, e.g., Hubbard v. United States, 115 S.Ct. 1754, 1763 (1995) (referring to The Federalist No. 78); United States v. Lopez, 115 S.Ct. 1624, 1626 (1995) (referring to The Federalist No. 45); Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447, 1454 (1995) (referring to The Federalist No. 48); Oregon Waste Systems, Inc. v. Oregon Dept. of Environmental Quality, 114 S.Ct. 1345, 1349 (1994) (referring to The Federalist No. 42).

require the states to embrace a "democratic" form of government, but a "republican" form of government. According to the principal author of this provision, James Madison, "democracy [consists] of a small number of citizens, who assemble and administer the government in person. [In contrast,] a Republic [is] a Government in which the scheme of representation takes place." The Federalist No. 10, at 61-62. Accordingly, the Republican Guarantee Clause imposes on the states the process of representative lawmaking in lieu of purely democratic lawmaking.

The Framers incorporated the guarantee of representative lawmaking into the Constitution to ensure that majoritarian factions do not sacrifice "the public good and the rights of other citizens" to their "ruling passion or interest." Id. at 60-61. Indeed, the Federalist Papers developed this theme quite clearly: "there are particular moments in public affairs when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament. . . . Government must provide "safeguard[s] against the tyranny of [such] passions." The Federalist No. 63, at 425 (J. Madison); see also The Federalist No. 49, at 343 (J. Madison) (government should regulate and control passions of public).

This Court, however, has generally adjudged the federal government's Republican Guarantee obligation nonjusticiable. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849). Cf. Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("*some* questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards") (emphasis supplied). However, *amicus* does not propose that purely democratic state lawmaking violates the Republican Guarantee or any other provision of the Constitution. Rather, the Republican Guarantee represents but one element of the Framers' vision of how American government would work and of how the rights guaranteed by the Constitution would be enforced. Since *at a minimum* the Republican Guarantee interposed a

procedural safeguard of minority rights against the tyranny of impassioned majority rule, *amicus* submits that the guarantee warrants a consideration of the minority-protective benefits of representative government whenever minority rights are burdened. In short, the Republican Guarantee does not invalidate direct initiatives.[4] Rather, the Republican Guarantee merely informs the nature of the judicial role with regard to direct initiatives which burden independently identifiable electoral minority groups.

2. Separation of Powers

> [I]f governmental power is fractionalized, . . . no man or group of men will be able to impose its unchecked will [on a minority].

United States v. Brown, 381 U.S. 437, 443 (1965).

The Constitution also filters majority will by dividing governmental authority so that no single governmental entity wields sufficient power to rule alone. Both the federal government and the state governments retain separate and distinct realms of power. Compare U.S. Const. art. I, §§8 and 10 with U.S. Const. amend. X. Further, each of the coordinate branches of the federal government act as a check on the others' use of governmental authority. Compare U.S. Const. arts. I, II and III. And, of particular significance to the question presented herein, this Court possesses the power to review state court decisions implicating federal law. Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). The Constitution diffuses power in this manner to make its oppressive use by government leaders as difficult as possible.

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[4] *Amicus* uses the term "direct initiative lawmaking" to refer only to lawmaking by the electorate without reference to elected legislative or executive actors. The term "referendum lawmaking," on the other hand, refers to complementary lawmaking both by the electorate and by elected representatives.

Because two or more governmental actors must essentially agree in order to effectuate the majority's will, the fragmentation of power among several constituencies limits the popular majority's ability to act in a unified, collective fashion. The Constitution's division of power, therefore, thwarts the many "interests and classes of citizens" such that the rights of individuals and minorities would be "in little danger from interested combinations of the majority." The Federalist No. 51, *supra*, at 324.

In sum, the Framers rejected simple majority rule because of their fear of unrestrained majoritarian factions. In its place they erected a representative structure which simultaneously enjoyed a relative detachment from and an ultimate accountability to the populace. And to ensure that neither detachment nor accountability got the upper hand, they separated and divided the centers of power. The role of this Court can only be assessed within the confines of this constitutional framework.

II. THIS COURT EVALUATES THE EFFICACY OF THESE FILTERS WHEN CONSIDERING CLAIMS BROUGHT UNDER THE FEDERAL EQUAL PROTECTION GUARANTEE

This Court accords a presumption of constitutionality to legislative enactments which pass through these filtering processes. Whenever these filters operate to effectively and fairly balance the imperative of majority rule against the constitutional mandate of equal application of the laws, this Court defers to the constitutional design and presumes no constitutional infirmity. When, however, these filters fail to fairly balance these concerns this Court does not defer to the legislative power. Rather, this Court subjects such legislation to heightened scrutiny to ensure compliance with the constitutional guarantee of equal protection.

A. The Constitution Imposes these Filters into Legislative Lawmaking, thereby Justifying this Court's Customary Presumption of Constitutionality

These process-based filters help improve the chances that legislation will fairly balance majority rule against minority rights. Representative government helps to moderate and restrain factious legislation in many ways. The Constitution's divided power scheme also prevents any concentration of power and any unconcerned unaccountability to minority rights. Accordingly, when these filters operate as the Framers intended, there is no reason for this Court to believe that minority rights have been unconstitutionally disregarded.

1. Representation Filters

This Court confers a presumption of constitutionality to legislative enactments out of respect for the filtering effect of representative government and its foundational principle that representative government guards against majoritarian excesses directed at electoral minorities. See The Federalist No. 51, *supra*, at 351 ("[i]f a majority be united by a common interest, the rights of the minority will be insecure"). First, representative government allows for deliberative, rather than imprudent, lawmaking. The legislative process includes time for discussion and confrontational debate, time for reflection and refinement of particular positions. In this way, deliberative lawmaking and the processes of debate and compromise moderate otherwise unrestrained legislation which may burden minorities. The Federalist No. 10, *supra*, at 59.

Second, a representative remains publicly accountable for the votes he takes on issues. To the extent the representative apprehends voter or party retribution for a vote against minority rights or to the extent the representative cannot publicly justify a vote against minority rights, the representative may vote otherwise.

Also, a representative may moderate anti-minority sentiments to avoid censure on the floor of the body by minority representatives.

Third, representative government compels an exposure to the views of others, including those of representatives from various electoral minority groups. Dialogue and exposure to minority representatives in turn reduce the likelihood that a representative will vote with animus against the minority group's interests because the knowledge and exposure gained through collaborative lawmaking effectively combat prejudice. In short, exposure to a minority group and its interests via exposure to minority representative helps to educate the non-minority representative and sensitize him to the group's rights and interests.

Fourth, a minority representative's membership on a legislative committee magnifies that representative's power to make policy. Because the committee's assent is necessary to send any proposal to the floor of the larger body, the minority representative can effectively impede legislation until the legislation addresses his concerns. In this way, the concerns of the minority group of which the representative is a member may be addressed and thereby protected. The legislature's committee structure also helps to protect minority rights through the hearing process. Hearings force proponents of both sides of an issue to air their views to a public audience, thereby helping to obstruct the enactment of unduly factious proposals.

Fifth, political parties play an integral part of the legislative process, helping to define and execute specific political agendas. Legislative members of a political party may vote to preserve minority rights against encroachment in accord with that agenda in the name of party loyalty or of political survival insured by party membership. To the extent a minority group's concerns resonate with a particular political party, that minority group may thereby amplify their voice in the legislative process.

Finally, the legislative process necessarily contemplates an

ongoing development of policy. If a particular representative works for success on a particular issue, he may promise cooperation on other issues such as minority rights in order to ensure success on his issue. To the extent, then, a representative needs the vote of a minority representative on a particular issue, he may vote in the minority's interests on other issues.

2. Separation of Powers Filters

This Court likewise confers a presumption of constitutionality to legislative enactments out of respect for the filtering effect of the Constitution's division of governmental power and its foundational principle that fragmented power prevents any single branch from becoming tyrannical. Ogden v. Saunders, 25 U.S. 213, 270 (1827) ("it is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt"). Because of this division of governmental power, the judiciary plays a limited, but necessary, role in enforcing the Constitution's balance between majority rule and minority rights.

First, although this Court's constitutional interpretations are supreme, they are not exclusive. Each officer of the political branches of government, both at the state and the federal level, also take an oath to conform his actions to the dictates of the federal Constitution. U.S. Const. art. VI, cl. 3. Presuming that each state and federal political officer abides by his constitutional oath, this Court may in turn reasonably presume that legislative enactments conform to constitutional requirements. See Missouri, K. & T. Ry. v. May, 194 U.S. 267, 270 (1904) (legislatures are ultimate guardians of personal liberties to the same extent as the courts). See also Eakin v. Raub, 12 Serg. & Rawle 330, 350 (Pa. 1825) (Gibson, J., dissenting) (legislators have a superior capacity to judge the constitutionality of their own acts).

Second, state and federal legislatures employ larger staffs and command greater resources and deliberative opportunities to make sound, rational decisions regarding public policy. Courts do not. Courts only have limited staff, resources and time to resolve the limited-scope disputes brought before them. Accordingly, this Court confers a presumption of constitutionality to legislative enactments out of deference to the legislature's deliberative process because legislation sponsored by rational and disimpassioned fact-finding defies naked aggression against electoral minorities.

Third, the Constitution requires the approval of both houses of Congress to enact law. Further, the executive veto provision of Article I, §7 empowers the President to veto an act of Congress before it becomes law. That same provision empowers Congress to override that veto, but only by a two-thirds majority. In this way the Constitution divides the legislative power among several actors, thereby requiring broad-based support for new law. This Court presumes the constitutionality of legislation enacted pursuant to this fragmented power scheme in part because requiring a broader base of support lowers the probability that the law reflects majoritarian faction against minority rights. See The Federalist No. 10, *supra*, at 83 (requiring multi-party agreement makes it less probable that a majority of the whole will have a common motive to invade the rights of other citizens).

3. Deferential Equal Protection Review

Whenever this Court presumes the constitutionality of legislation, it employs the "rational basis" standard of review under the equal protection guarantee. Under that test, this Court sustains legislation whenever the distinctions drawn by the law are rationally related to some legitimate state interest. Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

This deferential standard allows the states wide latitude "and the Constitution presumes that even improvident decisions *will*

eventually be rectified by the democratic processes." Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (emphasis supplied). In short, whenever legislation passes through the procedural filters designed to balance majority rule against minority rights, this Court presumes the constitutionality of the legislation and generally sustains it because these processes rectify, or filter, otherwise improvident decisions.

B. When, however, These Filters Fail to Work Properly, this Court Withholds the Presumption of Constitutionality and Rigorously Scrutinizes the Legislation Enacted Thereby

These procedural filters work most of the time; they do, however, sometimes fail. Pursuant to the Fourteenth Amendment's Equal Protection guarantee, this Court evaluates the efficacy of these political processes in balancing the imperative of majority rule against minority rights. In United States v. Carolene Products Co., 304 U.S. 144 (1938), this Court first articulated the framework by which it would (and today does) review the exercise of governmental power in this regard. In that opinion, Justice Stone wrote and foretold that:

> [t]here may be a narrower scope for operation of the presumption of constitutionality [accorded to] . . . legislation *which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation* [thereby] subject[ing such legislation] to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . . [Further,] prejudice against discrete and insular minorities may be a special condition, *which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities*, . . . call[ing] for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (emphasis supplied).

Accordingly, by reference to those decisions which affirmed Justice Stone's vision, this Court rigorously evaluates state laws enacted under a restricted or curtailed operation of those "political processes ordinarily to be relied upon to bring about repeal of undesirable legislation [or] to protect minorities." See, e.g., Hunter v. Erickson, 393 U.S. 385 (1969) (Equal Protection guarantee invalidates state political structures which allocate political power on the basis of non-neutral principles).

Those decisions developed the procedure by which this Court today evaluates the efficacy of these political processes. In accordance with Carolene Products, this Court will suspect that these political processes have not operated according to design, thereby calling for a more intense judicial filtering role, whenever it suspects that (1) prejudice against a "discrete and insular" minority group imposed itself into the legislative process (see McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (invidious discrimination targeted at certain electoral minority groups is unlikely to be soon rectified by legislative means, thereby mandating heightened judicial review)) or (2) whenever legislation burdens some identifiable constitutional protection (see Kramer v. Union Free School District No. 15, 395 U.S. 621, 626 (1969) (any unjustified discrimination in determining who may vote undermines the legitimacy of representative government)). In either case, the defendant can overcome the Court's suspicion by showing that the government found it necessary to impose the statute's burdens in an inequitable manner in order to achieve some weighty state interest. See, e.g., id.

In short, the state prevails whenever it shows that the filters did not break down, but that the government by necessity sacrificed minority rights for some relatively greater good. When, however, state lawmaking processes unduly restrict these filtering processes resulting in legislation which arbitrarily burdens minority rights in the service of some less than important or even illegitimate state interest, this Court invalidates the law in accordance with the Fourteenth Amendment's Equal Protection guarantee.

III. FACIALLY DISCRIMINATORY DIRECT INITIATIVES WHOLLY BYPASS THESE VERY POLITICAL PROCESSES AND THEREFORE SHOULD BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY

Direct initiative lawmaking targeted at an independently identifiable minority group deserves no presumption of constitutionality because it affords no opportunity to balance majority rule against the minority rights burdened. Indeed, direct initiatives wholly bypass the constitutional filters the normal operation of which confer the presumption of constitutionality. Accordingly, this Court should decline to presume the constitutionality of the direct initiative at issue and thereby stand in the stead of the bypassed filters.

A. Direct Initiative Lawmaking, such as that Used in the Passage of Amendment 2, Fails to Balance Majority Rule Against Minority Rights.

Direct initiative lawmaking which targets minority participation in the political process, such as that used in the passage of Amendment 2, cannot fairly be said to balance majority rule against minority rights. Direct lawmaking fails to provide for the moderating and minority-protective effects of representative government. It also consolidates the legislative power in one actor since in the direct initiative process the people assume the legislative power without the threat of veto. Accordingly, these filters have not even been given a chance to work as intended, thereby depriving this Court with any reason to presume that minority rights have been adequately safeguarded in this case.r

1. Representation Filters

Direct initiative lawmaking rejects each of the minority-protective features conferred by representative government. First,

direct initiative lawmaking does not allow for deliberation. Rather, direct initiatives merely aggregate a majority on one side and a minority on the other, awarding the legislative prize to the majority. There is no compelled occasion for discussion and debate and, in practical terms, relatively little time for reflection and refinement of particular positions. Gunn, Initiatives and Referendums: Direct Democracy and Minority Interests, 22 Urb.L.Rev. 135, 140-141 (1981) (when issues presented to the public are clear-cut and emotional, the prevalence of emotional fervor may result in "a reduction in the care with which voters evaluate the issues"). Further, manipulative advertising campaigns abound in the direct initiative process, oversimplifying the issues and appealing to the electorate's worst instincts. In short, there is little about direct initiative lawmaking which moderates otherwise unrestrained legislation burdening minority rights in the manner the Framers intended for legislation to be moderated.

Second, the majority voter accounts to no one for his vote (nor, because of the fundamental nature of the right to vote, should he). The majority voter/lawmaker need not be informed on the merits of an issue and may vote however irrationally he wishes to. While the public nature of anti-minority sentiments may moderate a representative's statements and votes, the private nature of the voting booth secures naked majoritarianism from the scrutiny of public exposure.

Third, the direct initiative process provides no direct opportunity for the majority voter to face and encounter the minority member whose rights are at issue. Accordingly, the process affords no opportunity for the minority voter to sensitize the majority voter to the nature and importance of the rights at issue. In a representative system, the minority may directly approach the relatively few legislators deciding a question and attempt to persuade them in his favor. See, e.g., Boulder, Colo., Rev. Code §§12-1-2 to -4 (1987) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation). The direct ballot system rejects such

opportunities.

Fourth, in stark contrast to a representative system of legislative committees, the direct initiative system dilutes minority voting strength much in the same manner as at-large elections. The minority voter/lawmaker's vote poses little threat to the ballot box success of a majority voter/lawmaker's interests. Indeed, rather than seek to work and compromise with the minority voter/lawmaker, the majority voter only wishes to quell the minority's objections.

Fifth, political parties play only a minor role in direct initiative lawmaking. They rarely take a stand on ballot measures and, in any event, do not retain the same degree of persuasion over the majority voter/lawmaker as they do over the representative. Because of this, the aggregation of minority voices and advocates in political parties impacts little the direct initiative process.

Finally, direct initiatives are a one-shot, winner-take-all means by which the electorate decides an isolated issue. Direct initiatives do not contemplate an ongoing development of public policy in general. The majority voter, then, never confronts and, indeed, never has to consider, an exchange of support now for another's support later. Although a representative must consider the views of his colleagues, majoritarian preferences cannot be reached by, much less moderated by, the idea of political compromise.

According to the Framers' design, the representative structure guarantees certain institutional mechanisms by which minority rights receive protection. In clear disregard for the Framers' vision that representative government captures the accountability of popular government and filters out its vices, direct initiative lawmaking rejects each of these mechanisms as either unnecessary or counter-productive. Accordingly, there is no reason for this Court to believe that minority rights have been adequately protected and that its filtering role is not needed.

2. Separation of Powers Filters

The direct initiative process consolidates broad governmental power in only one actor. Concentrated governmental power only invites tyranny and provides no opportunity to balance such power against minority rights. The direct initiative process dissuades against a presumption of constitutionality on this basis for several reasons. First, the Constitution binds only public officers with the duty to obey and conform their acts to its mandates. The Constitution imposes no such duty on the electorate. Moreover, when an initiative issue directs voters' attention along highly emotional lines, intuition suggests that an electorate not charged with the duty to respect constitutional boundaries may disregard such considerations altogether. Accordingly, unlike under our representative system, there is no reason for this Court to presume that by the time the legislation reaches the court, it had already been screened for constitutionality.

Second, unlike our legislatures, the electorate does not necessarily engage in the business of fact-finding and supporting its voting decisions with rational arguments regarding public policy, especially on highly emotional issues like minority rights. The electorate lacks the time, resources, and staff necessary for this task. Moreover, unlike our legislatures, the electorate cannot invite and expect expert advice on the issues raised in a direct initiative. The electorate's naked preferences, then, do not pass through the filter which necessarily requires consideration of rational and disimpassioned lawmaking. Accordingly, there is no reason for this Court to presume the rationality of the electorate's choice to expressly burden minority rights.

Finally, unlike the divided power design, the direct initiative process does not seek broad-based consensus on any particular issue, only a simple majority. Direct initiative lawmaking therefore heightens the risk that the legislative power will be exercised only by a factious majority acting for its own good rather than the whole of society, including society's minorities. Indeed,

Amendment 2 passed by a mere majority of 6.8% of the total votes cast. See Romer v. Evans, 854 P.2d 1270, 1272 (Colo. 1993). Accordingly, there is no reason for this Court to presume that the vote did not reflect a majoritarian faction against minority rights. See The Federalist No. 10, *supra*, at 83 (requiring multi-party agreement makes it less probable that a majority of the whole will have a common motive to invade the rights of other citizens).

B. Accordingly, this Court should not Presume Amendment 2 Constitutional but should Subject Amendment 2 to Heightened Scrutiny.

Since direct initiative lawmaking, such as that used in the passage of Amendment 2, deprives this Court of any basis upon which it may presume that majoritarian rule and minority rights have each independently and simultaneously been given due regard, this Court should withhold the usual presumption of constitutionality from its review of the legislation enacted thereby. By this suggestion, *amicus* does not propose that the process of purely democratic state lawmaking violates any provision of the Constitution. See James v. Valtierra, 402 U.S. 137, 141 (1971) ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice"). See also discussion beginning *supra* page 4 (the Constitution does not invalidate direct initiative lawmaking but merely informs the nature of the judicial role with regard to direct initiatives which burden independently identifiable electoral minority groups). Rather, *amicus* proposes that

(1) direct initiative lawmaking does not immunize legislation adopted thereby from judicial review (see Lucas, *supra*, 377 U.S. at 736-737 ("the fact that [legislation] is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act"));

(2) the federal constitutional guarantee to equal protection of the

laws presumes the existence of certain constitutionally- designed political processes which filter otherwise unrestrained majority rule (see Cleburne, *supra*, 473 U.S. at 440 (the Constitution presumes that even improvident legislative decisions will eventually be rectified by the democratic processes");

(3) this Court therefore enforces that guarantee by reference to the relative efficacy of these political processes in particular legislative settings (see Carolene Products Co., *supra*, 304 U.S. at 152 n.4);

(4) normally, legislation enacted by due reference to these political process raises no concern that these process have been restricted or curtailed (see Vance v. Bradley, 440 U.S. 93, 97 (1979) (there is no reason to infer antipathy when these political processes function properly);

(5) this Court has identified two "clues" by which it suspects that these political processes have been unduly restricted in the protection of minority rights: (a) suspect class (see McLaughlin, *supra*, 379 U.S. at 192 (invidious discrimination targeted at certain electoral minority groups is unlikely to be soon rectified by legislative means, thereby mandating heightened judicial review)) and (b) fundamental rights (see Kramer, *supra*, 395 U.S. at 626 (any unjustified discrimination in determining who may vote undermines the legitimacy of representative government));

(6) whenever this Court suspects that these political processes have been somehow curtailed, it scrutinizes the statute enacted thereby more closely to ensure that it rationally comports with the equal protection guarantee (see Cleburne, *supra*, 473 U.S. at 451-455 (Stevens, J., concurring) (all equal protection analysis asks the same question: could an impartial lawmaker logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class)); i.e., that it does not represent a legislative view that those in the burdened class are not as worthy or deserving as others (id. at 440 (White, J., for the Court);

(7) in contrast to the traditional standards of equal protection review, review of direct initiative lawmaking presents an opportunity by which this Court need not refer to "clues" or "suspicion" that the political processes have not worked to safeguard minority rights against majoritarian excesses; rather, *by its own express design* direct initiative lawmaking wholly bypasses these processes and affords no meaningful opportunity by which majority rule may be balanced against targeted minority rights; and

(8) therefore, absent any reason to presume that the legislation balances majority rule against minority rights, this Court should more closely scrutinize laws like Amendment 2 which pass by direct initiative and which expressly burden an independently identifiable and historically unpopular minority group.

In subjecting Amendment 2 to heightened scrutiny, this Court merely intensifies its filtering role for the unfiltered process Amendment 2 represents.[5] The positive need for a judicial filter is perhaps best expressed by stark analogy. In 1913, the people of Colorado amended their state constitution to prohibit judicial invalidation of direct legislation. See Colo. Const. art. 6, §1 (repealed). The people made the restriction applicable to the lower state courts only, however. Id. Why did the people fail to prohibit *all* judicial review of direct initiatives? Did they recognize the need for a judicial filter, or a review of the constitutionality of direct initiatives? Would a state constitutional amendment which *does* prohibit all state judicial review of direct initiatives pass federal constitutional muster? If so, would this Court subject legislation enacted thereby to merely rational basis review?

The instinctive answers to these latter questions is "no, certainly not." However, the Constitution permits states wide latitude in structuring their respective governments. See, e.g., Neb. Const. art. III, §1 (defining Nebraska's unicameral legislature). See also

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[5] This statement of course presumes a *de novo* review by this Court of the constitutional issues raised in this case.

Luther, *supra*, 48 U.S. at 47 ("the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure"). What if, though, a majority of statewide voters operating under a state constitution which prohibits state judicial review of direct initiatives had voted to deprive all citizens with blue eyes the right to life, unarguably the most "fundamental" of all rights. U.S. Const. amend. XIV, §1, cl. 3 ("nor shall any State deprive any person of life . . . without due process of law"). Without state judicial review for the constitutionality of such an initiative, there would be no state-sponsored impediment preventing the state executive from faithfully executing the laws and enforcing the elimination of all citizens with blue eyes.

The obvious response to this concededly extreme hypothetical is, of course, that the federal judiciary enforces the fundamental federal constitutional right to life against undue state encroachment. But, if states are permitted wide latitude in structuring their state governments, could a state electorate also enact a state constitutional amendment which prohibits both state *and federal* judicial review of direct initiatives? The answer to this hypothetical seems beyond reasonable argument: because of the federal judiciary's primary obligation to enforce federal constitutional rights imposed against undue state encroachment and because of the relative supremacy of federal constitutional rights, a state may not enact a state constitutional amendment to prohibit all judicial review of direct initiatives and consequently expect the federal judiciary to respect that law when a direct initiative raises meaningful questions of federal constitutional rights. See U.S. Const. art. VI, §2 ("This Constitution . . . shall be the supreme Law of the Land" superseding contrary state constitutional provisions). See also U.S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842, 1854 (1995) (the states may unquestionably retain a significant measure of sovereign authority, limited by that which the federal Constitution has not divested them).

The central point which may be gleaned from all of these

questions is that if this Court does not abdicate its responsibility to review absolutely unfiltered legislation for federal constitutional compliance, there is some substantive truth to the theory that unfiltered legislation warrants a more searching judicial inquiry. In turn, if there is some substance to this theory and if the judicial review filter is the only filter imposed upon the ultimate ratification of a statewide direct initiative which unfairly burdens a particular and unpopular minority group, should this Court merely presume the constitutionality of such an initiative; or, should it subject the initiative to some form of vigorous review to make up for the absence of the other constitutionally-designed filters? *Amicus* respectfully suggests the latter.

IV. BECAUSE THIS COURT SHOULD SUBJECT AMENDMENT 2 TO HEIGHTENED SCRUTINY, BY PETITIONERS' OWN CONCESSION, WELL-SETTLED PRINCIPLES OF EQUAL PROTECTION INVALIDATE AMENDMENT 2.

Petitioners assert that this Court may not disturb a state's power to allocate authority between its own political subdivisions absent some compelling reason to do so; i.e., absent some reason to apply heightened judicial scrutiny.[6] *Amicus* submits that Amendment 2's adoption by a process which never balanced majority rule against a due regard for minority rights represents such a compelling reason. Accordingly, by petitioner's own concession, Amendment 2 should be evaluated in light of this Court's decisions which apply heightened scrutiny to those laws which restructure the political processes and thereby impose a virtually impervious barrier on a particular minority group and on no one else.

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[6] Petitioners fundamentally mischaracterize Amendment 2. Amendment 2 precludes the State of Colorado through any of its institutions from protecting gays and lesbians from discrimination, including by action of the state legislature or the executive.

A. Petitioners Argue that this Court may not Disturb Amendment 2 Absent the Imposition of Some Form of Heightened Judicial Scrutiny.

Petitioners assert that "heightened [judicial] scrutiny is almost never appropriate where, as here, the challenged state action goes to the heart of state sovereignty. Thus, on its face, Amendment 2 carries with it a strong presumption of constitutionality." Brief for Petitioners at 10. They further charge that "[u]nder Hunter [*supra*] and its progeny, the Equal Protection Clause only prohibits efforts to realign the political process in a manner designed to harm a racial minority." Id. at 19. Petitioners expend much effort to defend a position that Hunter applies only in race cases and that Hunter did not recognize a fundamental right against state action to "disadvantage any particular group by making it more difficult to enact legislation on its behalf." Id. at 18-39 (*referring to* Hunter, *supra*, 393 U.S. at 393).

Petitioners' argument elevates theoretical form over constitutional substance by strictly formalizing this Court's suspect class theory and fundamental rights theory. Petitioners suggest that unless and only unless this Court perceives these two factors, there is no need for heightened judicial scrutiny. These two factors, however, merely act as clues to which this Court looks to determine the efficacy of those political processes ordinarily to be relied upon to protect minorities. Because a legislative burden on a pre-defined suspect class or on a fundamental right rarely relates to the achievement of any legitimate state interest, this Court considers these two factors as indicators that the political processes have been restricted and failed to properly advance a due regard of minority rights.

In short, petitioners ignore the constitutional substance of Carolene Products' reference to "political processes" and instead rely only on the formulaic theories developed in Carolene Products' progeny. Petitioners therefore would have this Court proceed along a line of reasoning and simultaneously ignore the

very foundation of that line of reasoning. However, rather than look for clues and having to suspect that heightened scrutiny is required, *amicus* respectfully submits that this Court should recognize that Amendment 2 passed without any reference to the political processes ordinarily to be relied upon to protect minorities. For that reason alone, this Court should sharpen its filtering role in its review of Amendment 2 and thereby subject Amendment 2 to a more rigorous degree of scrutiny. Accordingly, this Court should recognize petitioners' argument for what it is: a concession that unless this Court subjects Amendment 2 to heightened scrutiny (or, in petitioners' simply formulaic terms, unless Amendment 2 burdens either a suspect class or fundamental right) there is no need to disturb Amendment 2's intended effect.

B. Amendment 2 Requires Heightened Scrutiny by this Court; Assuming, *arguendo*, the Accuracy of Petitioners' Argument, Amendment 2 Must Fail.

But, *amicus* has persuasively demonstrated that because of the process by which Amendment 2 was adopted, this Court should subject Amendment 2 to a more rigorous degree of scrutiny than that normally associated with its review of legislation which carries a presumption of constitutionality. Accordingly, even if this Court accepts petitioners' premise argument,[7] it should apply those decisions which, in a heightened scrutiny context, evaluate structural changes in the political process which impose a virtually impervious barrier on a particular minority group and on no one else.

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[7] *Amicus* suggests that the Colorado Supreme Court's fundamental rights theory (see Romer v. Evans, 854 P.2d 1270, 1272 (Colo. 1993)), and *amicus* Human Rights Campaign Fund's suspect class theory also suggest equally valid analyses in this case.

C. Hunter v. Erickson and its Progeny Invalidate State Allocations of Political Power Achieved on the Basis of a Non-Neutral, Group-Specific Principle.

The seminal case on which the Colorado Supreme Court relied, Hunter v. Erickson, 393 U.S. 385 (1969), invokes the equal protection guarantee to invalidate state political structures which allocate political power on the basis of non-neutral principles. In Hunter, the Akron, Ohio, city council adopted a fair housing ordinance which prohibited housing discrimination on the basis of race, color, religion, ancestry, or national origin. In response to that ordinance, the Akron electorate amended the city charter by direct initiative to repeal the fair housing ordinance and to prohibit any future ordinance dealing with group-based discrimination in housing, unless it had first been approved by a majority of the voters. This Court held that this charter amendment violated the equal protection guarantee because it clearly made it more difficult to enact antidiscrimination ordinances than to enact other types of ordinances. Id. at 393. The Court recognized that equal protection prohibits the reallocation of governmental decisionmaking power to impose special burdens on minorities within that process. Id. at 391.

Justices Harlan and Stewart concurred separately to the majority opinion on the basis that equal protection prohibits the allocation of governmental power on the basis of any non-neutral principle. Id. at 393-396. The concurring justices first contrasted such restructurings with those political restructurings which provide a just framework within which the diverse political groups in our society may fairly compete. Id. ("If a governmental institution is to be fair, one group cannot always be expected to win"). The justices then identified the Akron ordinance as one in which minorities were saddled with special burdens to equal participation in the political process. Id. ("the city of Akron has not attempted to allocate governmental power on the basis of any general principle").

Thirteen years later, this Court used Hunter on the same day in June, 1982, to decide two very different decisions in two very similar cases. See Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), and Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982). Both cases involved the Court's review of statewide electoral lawmaking designed to curb mandatory school busing to achieve racial balance. In Seattle School District, the initiative prohibited school districts from requiring any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence. 458 U.S. at 462. The initiative allowed busing for reasons none of which referred to race. Id. at 470-484. This Court voted 5-4 to invalidate the statewide vote, finding that the initiative altered the structure of governmental decisionmaking and thereby cast unequal burdens on a suspect class. Id. at 485-487. In Crawford, the statewide vote stripped state courts of the power to order busing except in cases of Fourteenth Amendment violations. 458 U.S. at 527. In that case, this Court voted 8-1 to uphold the statewide vote, finding that the law simply repealed the right to invoke a particular remedy; it did not work a structural change in the political process. Id. at 546-547 (Blackmun, J., concurring).[8]

Though seemingly irreconcilable, this Court bound all of these cases with a singular and principled thread: the legislative power, whether exercised by the legislature or by the people, may not single out for peculiar and disadvantageous treatment those political processes or decisionmaking mechanisms used to protect minority rights and interests. Id. (Blackmun, J., concurring) (*citing* Seattle School District, *supra*, 458 U.S. at 458). This Court adheres to the principle that the legislative power, whether exercised by the legislature or by the people, may not restructure the political processes according to any non-neutral, group-specific principle.

[8] Justice Blackmun, concurring in Crawford, authored the Opinion of the Court in Seattle School District. Justice Blackmun wrote separately in Crawford to distinguish his seemingly opposing votes in the two cases.

Seattle School District, *supra*, 458 U.S. at 470.

In the instant case, the Colorado electorate adopted Amendment 2 which not only repealed then-existing antidiscrimination laws protecting gays and lesbians, but also prohibited any state governmental entity from adopting similar laws in the future unless the state constitution is again amended to permit such measures. Amendment 2 therefore unambiguously alters the state political process with sole reference to Colorado's gays and lesbians, prohibiting them from obtaining legislation in their favor absent the consent of a majority of the statewide electorate through the adoption of a state constitutional amendment. Rather than merely repealing the then-existing antidiscrimination laws, Amendment 2 went one step further and fundamentally reallocated political power along a non-neutral, group-specific principle. No other independently identifiable electoral minority faces such a burden and no other group's access to the mere chance to persuade political power in its favor is restricted. In accordance with this Court's decisions in Hunter, Seattle School District, and Crawford, *supra*, this Court should invalidate Amendment 2. The federal equal protection guarantee requires no less.

CONCLUSION

WHEREFORE, the judgment of the Supreme Court of Colorado should be affirmed.

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